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Deputy Assistant Attorney General
Federal Programs Branch



Subject

Repeated Recess Appointments to the
Same Person

Date

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From
NAME: Herman Marcuse
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STATEMENT:

Between September 15th and 17th, 1982, Deputy Assistant Attorney General Simms and I had several telephone conversations with Deputy Counsel to the President Hauser concerning the Directors of the Legal Services Corporation. These Directors were given recess appointments during the recess between the first and second sessions of the 97th Congress. After the grant of the recess appointments, the President nominated them for those positions. The pertinent committee reported favorably on the nominations; confirmation, however, is held up in the Senate as the result of objections to one of the nominees. Mr. Hauser inquired whether, in the event that the second session of the 97th Congress should adjourn sine die without confirming the Directors, the President could give them new recess appointments and whether they could be paid in those circumstances.

According to Article II, § 2, cl. 3 of the Constitution recess appointments expire at the end of the "next session" of the Senate, i.e., at the end of the session following the recess appointment. The recess appointments given to the Directors of the Legal Services Corporation will expire upon the final adjournment of the current session of the Senate.

We advised Mr. Hauser that there were no constitutional or statutory prohibitions against the grant of new recess appointments to the incumbent Directors, but there was a question whether the payment of their compensation prior to confirmation was precluded by 5 U.S.C. § 5503. That section provides:

§ 5503. Recess appointments

(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply --

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

(b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

The section thus prohibits payments for services "from the Treasury" to recess appointees if the vacancy existed, as it did here, while the Senate was in session, unless one of the three enumerated exceptions applies; none is applicable here. Indeed, 5 U.S.C. § 5503, and especially its second exception, is directed at repeated recess appointments to the same person.

The situation at hand raises a threshold problem. The language of 5 U.S.C. § 5503 prohibits payments for services "from the Treasury." This raises, first, the factual question whether the Directors receive payment for their services directly from the Treasury or by checks drawn on the Corporation.

We have received information from the Legal Services Corporation that for many purposes its funds are considered to be the funds of a private corporation and not public funds. There are also indications that the funds appropriated to the Corporation are not kept in the Treasury but that they are transferred to the Corporation's checking account soon after appropriation. Hence, it is not likely that the Directors are paid by checks drawn on the Treasury of the United States.

Second, even if the funds of the Corporation are not public funds, the question still arises whether § 5503 is to be read literally as being limited to payments from the Treasury or whether it generally applies to the payment of compensation to recess appointees, whether or not paid from the Treasury, especially where, as here, a larger portion of the funds originated in the Treasury. The fact that the President has the power to make recess appointments to the Board of Directors of the Legal Services Corporation although the Corporation is not considered to be a department, agency, or instrumentality of the Federal government (42 U.S.C. § 2996e(l) ^{*/} suggests that the statutes governing recess appointments might be applicable to the Corporation, at least by way of analogy. In this connection, we drew to Mr. Hauser's attention a memorandum of this Office prepared in 1980 relating to the Synthetic Fuel Corporations in which this Office had "recommended" to the Office of the Counsel to the President that § 5503 not be construed literally so as to limit it to payments directly made by the Treasury. See the attached file memorandum of August 6, 1980. A Juris Search has not disclosed any pertinent OLC memoranda. DAAG Simms, however, feels this problem deserves more intensive research into the legislative history of 5 U.S.C. § 5503 and its antecedents and indicated that he would assign it to an attorney in this Office.

Finally, I mentioned to Mr. Hauser that should the President not withdraw the current nominations but give recess appointments to persons other than the incumbents, the literal language of the second exception to § 5503 would seem to prohibit the payment of compensation to them. An opinion of the Comptroller General, however, has interpreted that second exception as being directed only at successive recess appointments to the same person. Hence, even if the President should not withdraw the pending nominations prior to the end of the session, but give new recess appointments to persons other than the incumbents, the new recess appointees could be paid prior to their confirmation. 36 Comp. Gen. 444 (1956).

*/ It should be remembered that the incumbent Directors are serving under recess appointments.